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Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC.,
Petitioners,
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co. Inc.,
Respondent.

No. 505.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey Corporation,
Respondent.

No. 506.

BRIEF OF GODFREY GOLDMARK AS AMICUS CURIAE ON BEHALF OF TRUSTEE IN BANKRUPTCY OF McCRORY STORES CORPORATION.

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BRIEF OF GODFREY GOLDMARK AS AMICUS CURIAE ON BEHALF OF TRUSTEE IN BANKRUPTCY OF McCRORY STORES CORPORATION.

Pursuant to leave granted, this brief is filed on behalf of the Trustee in Bankruptcy of McCrory Stores Corporation, bankrupt.

McCrory Stores Corporation, which with its subsidiaries operated 242 stores throughout the country, was ad-

judicated a bankrupt in New York on January 14, 1933 upon its voluntary petition. The value of the assets of that estate is estimated at between $5,000,000 and $8,000,000 depending on the realizable value of equities in real estate. While merchandise creditors, debenture holders and miscellaneous creditors have filed claims aggregating $9,000,000, landlords have filed claims aggregating $43,000,000 for future rent and damages.

It is evident, therefore, that the Trustee in Bankruptcy of McCrory Stores Corporation representing the creditors in that estate has a real interest in the outcome of these cases.

The Reasons for Filing Brief as Amicus Curiae.

This brief is filed because the underlying questions have recently become of paramount importance to property owners, general creditors, bankrupts, and consequently to the public itself.

During the past two years large corporations operating stores in numerous states throughout the country, and generally known as "chain stores," have as a result of the depression found their volume of business and profits constantly dwindling and have been unable to reduce their expenses proportionately, largely because of the existence of fixed obligations for high rentals on long term leases made during normal or exceedingly prosperous times. Gradually cash and quick assets have been consumed in paying such rents until "equitable insolvency"—the inability to meet obligations as they matured—has resulted, although in some cases not insolvency in the bankruptcy sense. The result has been that in fairness to merchandise creditors, debentureholders and other creditors whose claims had matured, these corporations were bound by voluntary petition to surrender their property to the bankruptcy court for administration. This procedure has in many quarters resulted in the cry that the purpose of the bankruptcy proceeding was to avoid lease obligations, to defraud the

landlords and to enable stockholders of these corporations to become revested with the property after the termination of the bankruptcy proceeding. This contention, however, has overlooked the doctrine of the *Boyd* case (*Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482).*

The foregoing is the background which has caused these cases to excite a general interest.

The Present Rule and its General Acceptance.

For many years since the enactment of the Bankruptcy Act of 1898, it has been the general view that under the ordinary form of leases exacted by landlords, claims for future rent or for damages for breach of lease obligations are neither provable nor dischargeable in bankruptcy. For the second circuit, the question was deemed decided in 1910 in *In re Roth & Appel*, 181 Fed. 667, which but followed a similar ruling under the Act of 1867 *Ex parte Houghton*, 1 Lowell, 554. For the Eighth Circuit including Nebraska it was decided in *Watson* v. *Merrill*, 136 Fed. 359 in 1905. In a majority of the circuits the same rule has obtained. Relying upon the doctrine of these cases, credit has been extended for untold millions upon the confident assumption that if bankruptcy of the person obtaining credit ensued, the speculative claims of landlords for future rent or damages growing out of long term leases would not share with the ordinary unsecured general creditor in the distribution of the bankrupt's assets.

During all the intervening years, landlords have evidently been content with this interpretation of the 1898 Act because no evidence is found of any effort either to bring the question to this court for determination or to amend the law until the recent agitation. *The very leases here considered were made with knowledge of the existence of the accepted and prevailing rule of interpretation of the*

*For general discussion of the applicability of that case to the situation above described, see "Landlord Claims In Reorganization" by William O. Douglas and Jerome Frank, 42 Yale Law Journal, 1003, 1933.

covenants here involved. The rule has been considered a fixed rule of bankruptcy upon which all business transactions and the extension of credits have been predicated.

Under these circumstances, the injustice to the ordinary general creditor of now permitting claims of landlords of many millions of dollars to share pari passu in the distribution of the bankrupt's assets, need not be enlarged upon.

In *Maynard* v. *Elliott*, 283 U. S. 273, 277, in discussing the question of the provability of claims against endorsers under certain circumstances and the effect of the establishment of a rule contrary to that deemed to be in force, this Court said:

> "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance."

That principle of construction is peculiarly applicable here.

The Question is for Congress.

Perhaps after a careful study of the whole subject Congress may for the future provide some fair measure of participation for landlords despite the termination of a lease by re-entry. (See for example suggestions of Committee set forth in footnote on p. 7.) Perhaps on the other hand Congress may deem the question a local one to be determined by each State and that the landlord's right in bankruptcy should be limited to the right to a priority or a lien for rent for a given period, as is now provided by the statutes of many States and protected by Sections 67 and 64 of the Bankruptcy Act.* Perhaps on the other hand, landlords should be in the same class as tort

* See for example *Martin* v. *Orgain*, 174 Fed. 772 (C. C. A. 5th) upholding a lien for rent accruing after bankruptcy under a Texas statute.

claimants or claimants under the Workmen's Compensation Act whose claims are neither provable nor dischargeable in bankruptcy.

Schall v. *Camors*, 251 U. S. 239;
Lane v. *Industrial Com'r of New York*, 54 Fed. (2d) 338.

In *Schall* v. *Camors*, supra, as the briefs show, it was strenuously argued that tort claims should be provable in bankruptcy; that it was the underlying purpose of the Bankruptcy Act to permit all creditors to share in the bankrupt estate; that claims which are not provable are not discharged; and that it was contrary to one of the underlying purposes of the Bankruptcy Act to deny the right to prove such claims because as a result the bankrupt would not be discharged.

Despite all this argument, this court held that it was not the intention under the Act of 1898 to allow ordinary tort claims based on nonfeasance or malfeasance without unjust enrichment to be proved and held if any remedy were needed, it was a question for Congress. Although fourteen years have elapsed since that decision, no amendment has been passed or agitated looking for the allowance of tort claims in bankruptcy.

Broadly speaking, it is as unjust to tort claimants to deprive them of their right to share in the assets of the corporate bankrupt as it is claimed to be unjust to a landlord, and it is unjust to the individual bankrupt to keep alive against him claims in tort (not resulting in unjust enrichment) as it is to keep alive lease obligations.

Accordingly, whether and to what extent there should be a change in this situation is obviously a legislative and not a judicial question. It is a question upon which different minds may differ radically. For example, the attempt to speculate upon and presently determine future damages growing out of the breach of long term leases, and the inclusion of the amount of an expert's guess of such dam-

ages, as a provable claim to cut down the dividends of other creditors, may well result in the curtailing of credit in the future unless long term leases are abolished. Whether the landlords themselves would desire such a result may well be doubted.

Fixed legal rules acquiesced in and relied upon in every day commercial transactions for a long period of time may be changed by Congress in the future after full consideration, but injustice and hardship must result if these rules are changed for the past by a reversal of the long accepted rule unless required by "compelling language in the statute." *That there is none such but that on the contrary Congress did not intend to include such claims as provable debts will be shown hereafter.*

Pending Legislation.

At the very last session of Congress, a bill was introduced H.R. 5884 (73rd Congress, 1st Session), which included a provision for the amendment of Section 63 of the Bankruptcy Act so as to provide for the inclusion of provable debts of claims upon workmen's compensation awards and claims for damages upon leases.[1] The bill did not pass.

At this very time there is also under consideration the third tentative draft of amendments to the Bankruptcy Act proposed by a representative committee under the lead of Paul H. King, Esq., Chairman of the Committee on Bankruptcy of the Michigan State Bar Association and Chairman of the Committee on Uniformity of Practice of the National Association of Referees in Bankruptcy. That Committee's recommendations with respect to the provability

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[1] "Sec. 4. (a) Section 63(a) of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, as amended, is amended to read as follows: * * *.

"(6) founded upon an award of an industrial accident commission, or other commission, body or officer, of any State or Territory having power or jurisdiction to make awards as workmen's compensation in case of injury or death for injury prior to adjudication; and (7) claims for damages respecting executory contracts including future rent whether the bankrupt be an individual or a corporation, which claims shall be liquidated under section 63(b) of this Act."

of claims growing out of leases set forth below show that the competent draftsmen are aware of the possible injustice to other creditors in permitting landlords to prove claims for future rent as suggested in H. R. 5884 (73rd Congress) quoted at page 6 supra, or for damages for breach of an entire lease.[2]

The whole subject should be left to Congress for further consideration.

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[2]The Committee includes Mr. James A. McLaughlin of the Harvard Law School, Mr. Peter B. Olney, Jr., a New York Referee, Mr. Harold Remington, author of Remington on Bankruptcy, and Mr. Edwin S. S. Sunderland of the law firm of Davis, Polk, Wardwell, Gardiner & Reed.

The third tentative draft of amendments of that Committee contains the following addition to Section 70 of the Bankruptcy Act:

"b. The adjudication in bankruptcy shall constitute an anticipatory breach as of the date of the petition, without regard to the actionability of anticipatory breaches under state law, of any contract non-assignable on the part of the bankrupt or not adopted by a trustee within a reasonable time after his qualification and within four months after the adjudication whether a trustee has qualified or not. An unexpired lease of real or personal property is an executory contract within the meaning of this paragraph and claims for loss of the unexpired portion thereof shall be provable if either party become bankrupt. A discharge shall relieve a bankrupt of all liability under leases or other executory contracts entered into before the petition except as otherwise provided in Section 17. The bankruptcy of a landlord, however, shall not work forfeiture of the tenant's estate and shall give the landlord's trustee in bankruptcy no election to terminate the estate. A general covenant in a lease that it shall not be assigned shall not be construed to prevent such lease passing to the trustee at his election, but an express covenant that the bankruptcy of a specified party thereto or of either party shall terminate the lease at the election of the other party shall be valid."

It also proposed the following amendment to Section 63(4) of the Act:

"(4) founded upon an open account, or upon a contract express or implied, including claims for anticipatory breach, as provided in section 70(b): Provided, however, that a claim of a landlord for anticipatory breach of an unexpired lease of real estate *shall in no event be proved or allowed in an amount exceeding the rent reserved by the lease for the year next succeeding the bankruptcy;*"

And it proposed the following as Section 63(b) of the Act:

"b Contingent claims and claims for anticipatory breach shall be barred by a discharge, unless submitted under oath for allowance as provided in Section 57, and shall be deemed provable unless the court finds the contingencies incapable of being fairly estimated, in which event such claims shall not be deemed provable."

And the following as Section 63(c):

"c (b) Unliquidated contingent claims and claims for anticipatory breach of contract (claims against the bankrupt) may (, pursuant to application to the court,) be liquidated in such manner as (it) the court shall direct. (, and may thereafter be proved and allowed against his estate.) The liquidation of a contingent claim, or a claim for anticipatory breach of contract, may be postponed until it appears whether or not such claim is to become capable of being fairly estimated without unduly delaying the administration of the estate."

Words proposed to be deleted from the present Act are enclosed in parenthesis.

The Question Presented in these Two Cases.

Because of the particular covenants contained in the particular leases here involved, these two cases *do not* present the broad question whether claims for future rent are provable in bankruptcy.* They do not present the question whether under some form of covenant not contained in these cases provable claims for damages might be presented. *Obviously these cases present the sole question whether the courts below erred in expunging the particular claims predicated upon the particular covenants in the leases between the claimants and the bankrupt which covenants expressly contemplated bankruptcy of the tenant and provided for the rights and obligations flowing therefrom.*

BRIEF OF THE ARGUMENT.

I.

The provability of claims must be determined as of the date of the filing of the petition in bankruptcy. On that day each creditor with a provable claim gets an interest in rem in the assets of the bankrupt.

II.

The leases here involved contemplated the possible bankruptcy of the tenants and contained express covenants of indemnification against loss, fixing the landlords' rights and the method and time of enforcement of the tenants' obligations in such event. There is therefore no basis for attempting to invoke the doctrine of anticipatory breach of contract on the theory of implied covenants against going into bankruptcy as was done in the *Chicago Auditorium* case, 240 U. S. 581. These express covenants measure the

* See *infra*, page 30.

landlords' rights and do not create a provable claim. The decisions of the New York Court of Appeals and two unreported and clearly reasoned decisions support these views. Nor can there be an anticipatory breach of these express covenants by bankruptcy because the covenants only became effective upon the tenants' bankruptcy and could not be breached by that very fact.

III.

Even if the foregoing contentions are not sustained then nevertheless the claims under the covenants are so contingent that they are not provable. Congress by omitting the provisions for the proof of contingent claims contained in the 1867 Act intended that such claims should not be provable and the omitted provisions cannot be put back by construction. The decided cases, too, show that such claims are contingent and not provable. *Maynard* v. *Elliott*, 283 U. S. 273, does not militate against but on the contrary supports these views.

IV.

The petitioners' brief asks this Court to disregard history, precedent and rules of statutory construction and to make all claims for loss of future rent provable irrespective of covenants and irrespective of their reentry upon the leased premises. Their argument leads to impossible results. Obviously the whole question is for Congress.

V.

The amendments of 1933 do not make the claims provable. The provisions are not retroactive and could not be made so.

POINT I.

Provable debts include only those provable at the filing of the petition in bankruptcy.

The foregoing rule is established by the following cases:

In *Williams* v. *U. S. Fidelity & G. Co.*, 236 U. S. 549, 556, this Court said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation. Dunbar *v.* Dunbar, 190 U. S. 340, 350; Crawford *v.* Burke, 195 U. S. 176, 187; Grant Shoe Co. *v.* Laird, 212 U. S. 445, 448; Zavelo *v.* Reeves, 227 U. S. 625, 631."

In *Zavelo* v. *Reeves,* 227 U. S. 625, the bankrupt between the filing of the petition and his discharge agreed to pay one of his provable debts. The question was whether the debt was discharged. This court held that it was not, and in the course of its opinion, said at page 631:

> "But, reading the whole of Section 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under Section 63a 4 *include only such as existed at the time of the filing** of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, 1898, under the authority conferred by Section 30, a form of discharge was prescribed (Forms in Bankruptcy No. 59) by which it is ordered that the bankrupt 'be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the day of A. D. , on which day the petition for adjudication was filed him; excepting such debts as are by law excepted

*Italics supplied throughout.

> from the operation of a discharge in bankruptcy'. And the forms prescribed for proof of debts all declare that the indebtedness existed 'at and before the filing of the said petition'. Forms 31 to 36 inclusive. The General Orders and Forms, etc., are to be found in 172 U. S. Appendix; 89 Fed. Rep., Preface; 32 C. C. A. Preface; 3 Foster's Fed. Pract. (4th ed.) 2526, 2559, 2572."

And in *Maynard* v. *Elliott,* 283 U. S. 273, 275, this Court said:

> "Although the omission of any reference to contingent claims in Section 63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the petition is filed."

The statement in the latter case that the claim need not be "absolutely owing", when the petition is filed perhaps overlooks the requirement of Section 57(a) of the Act, which provides as follows:

> "Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, *and that the sum claimed is justly* OWING *from the bankrupt to the creditor.*"

One of the reasons for the rule that the date of the filing of the petition is the date upon which provability of claims must be determined, is that upon the filing of the bankruptcy petition (followed of course by adjudication) each creditor with a provable claim gets a right in rem in the assets of the bankrupt which is in the nature of a lien upon such part of the property of the bankrupt

as the amount of the creditor's provable claim bears at that time to the entire amount of the provable claims. This is a vested right in property.

Board of Commissioners v. *Hurley*, 169 Fed. 92;
Chemical Bank v. *Armstrong*, 59 Fed. 372, 378;
Sexton v. *Dreyfus*, 219 U. S. 339, 345.

Again the whole scheme of the Bankruptcy Act is that the date of the filing of the petition is the date for determining the substantive rights of the parties. Thus where a bankrupt dies after the filing of a petition and even before adjudication, the Trustee gets only the surrender value of life insurance policies and the remainder of the proceeds of the policy goes to the beneficiary.

Everett v. *Judson*, 228 U. S. 474.

And where a creditor has a claim against a principal and surety and both are in bankruptcy, the creditor's rights against the two estates are fixed as of the time of the filing of the petition.

Board of Commissioners v. *Hurley*, *supra*.

So, too, as to the vesting of title in the Trustee under Section 70 of the Bankruptcy Act as construed in the *Judson* case.

In the light of this rule, it will be shown that at the time of the filing of the petition in bankruptcy neither claimant here had a provable claim in bankruptcy.

POINT II.

The leases here involved contemplated the possible bankruptcy of the tenants and contained express covenants fixing the landlords' rights and the tenant's obligations in such event. There is, therefore, no basis for attempting to invoke the doctrine of anticipatory breach of contract on the theory of an implied covenant against going into bankruptcy. These express covenants measure the landlord's rights and do not create a provable claim.

In the leading case of *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581, this Court held that the bankruptcy of the transfer company constituted an anticipatory breach of its contract to furnish service to the Auditorium Hotel because the bankruptcy stripped the transfer company of its assets which were needed in the performance of the contract and therefore disabled it from performing its obligation. The very basis of the court's decision was found in the following sentence:

> "In short, it must be deemed an *implied* term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement." 240 U. S. at 591.

In the present cases, the situation is wholly different. Unlike the *Auditorium* case the parties here did not impliedly undertake with respect to bankruptcy and leave it to the law to determine their rights. On the contrary the parties contemplated the possibility of bankruptcy of the tenant and *expressly* provided the rights and obligations which should flow therefrom. The leases, presumably containing clauses exacted by the landlords, provided that the

bankruptcy of the tenant should be an act of default, and provided that thereupon the landlord at his option might re-enter the premises; and provided that in the event of such re-entry in the one case (#595, Record, p. 12) that the tenant would pay at the end of each month the difference between the reserved rental and the avails of reletting, and in the other case (#506, Record, p. 28) that the tenant would "indemnify" the lessor against all loss of rent which the landlord might incur by reason of the termination during the residue of the term. *The parties having thus expressly provided for the rights and the remedies flowing from the tenant's bankruptcy, there cannot be implied either in law or in fact any other remedy or any measure of damages other than that so solemnly contracted for.*

In *Miller v. Schloss,* 218 N. Y. 400, the New York Court of Appeals said at page 406:

> "A contract cannot be implied in fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged; *or where there is an express contract covering the subject matter involved;* or against the intention or understanding of the parties; or where an express promise would be contrary to law. The assent of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted (Morse *v.* Kenney, 87 Vt. 445; Mathie *v.* Hancock, 78 Vt. 414; Hertzog *v.* Hertzog, 29 Pa. St. 465; Earle *v.* Coburn, 130 Mass. 596; Central Bridge Corporation *v.* Abbott, 4 Cush. 473)."

This general principle has specifically been applied to the situation here presented by the New York Court of Appeals in *McCready* v. *Lindenborn,* 172 N. Y. 400.

When read together the bill of complaint and the bill of particulars as pointed out by the Court of Appeals, set forth three causes of action—"one for rent accrued, a second for breach of covenant to pay the deficiency, *and a third cause of action for a total breach of the*

lease." In that case, as here, the lease provided that the landlord could re-enter on the failure of the tenant to pay rent and that if he did so the tenant should become liable to pay him by way of damages "the difference between the amount of rent reserved and the amounts of rents which shall be collected and received or might with due diligence be collected and received from said demised premises during the residue of said term remaining unexpired at or immediately before the time of such re-entry —in equal monthly payments as the amount of such difference shall from time to time be ascertained". And in that case, as here, the landlord instead of relying upon the remedy given him by the lease tried to rely on a common law right to treat the lessee's non-payment of rent and repudiation of his rent covenant as a breach of the entire lease so that he might retake possession *and sue at once for damages for breach of the entire lease.* There, as here, the landlord preferred the common law right, if there was one, of suing at one time for damages for breach of the whole lease to the right given him by the lease which was to sue from month to month as and if there was a difference between the amount of rent reserved and the amounts collected from the premises on a re-letting.

The trial court, however, ruled that plaintiff, in bringing action for damages for breach of the entire lease was premature and refused to permit plaintiff to introduce evidence as to her damages. Thereupon, plaintiff took exceptions to the Appellate Division which reversed the trial court and held that the plaintiff at common law could treat the non-payment of rent and the lessee's repudiation as a breach of the entire lease and could re-enter and sue for damages for such breach at once and that she did not have to rely on the remedies given her by the covenants of the lease. The Appellate Division said, 63 App. Div. 106, 111:

> "By the commencement of this action, however, the plaintiff alleged a total breach of the lease by the defendant and sought to recover in this action the damages sustained by reason of the breach. The

action was not brought to enforce the covenant to pay rent. There can be no doubt but that the plaintiff would have had the right under the covenants contained in this lease to re-enter to lease the property and to recover under the lease the difference between the rent reserved and the amount that she was able to realize from the property. *She did not adopt that course, but elected to treat the act of the defendant as a total breach of the lease and to recover in one action the damages sustained by such breach, and the question is whether or not such an action can be maintained.* The distinction between an action to recover money due under an agreement and an action to recover the damages sustained by a breach of the agreement, is well recognized. The legal effect of a breach of a contract of hiring for a definite period and the right of a party to it after such breach was exhaustively examined by the court in Howard *v.* Daly (61 N. Y. 362). In that case, it was held that 'A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach. (2) He may rescind the contract; in which case he could sue on a quantum meruit, for services actually rendered. These remedies are independent of and additional to his right to sue for wages, for sums actually earned and due by the terms of the contract.' The learned judge also examined the rule to be applied in case of the defendant's repudiation of the contract at the time of entering into the service, and he held, following the cases of Hochster *v.* De La Tour (2 El. & Bl. 678) and Frost *v.* Knight (L. R. (7 Exch.) 111 revg. S. C. L. R. (5 Exch.) 322), that the opposite party has an option either to treat the contract as subsisting, and when the day arrives for commencing to serve to offer to perform, or to regard it as immediately broken, and to sue before the day arrives. This distinction between an action to recover damages for the breach of a contract which is in its character executory, containing mutual covenants by the contracting parties, and an action to enforce the covenants and agreement of such a contract is recognized in all the cases, and is based upon the right of a

party to such an agreement to elect whether he will consider the contract as broken and destroyed, and demand in one action the damages sustained, or, notwithstanding the refusal of one party to carry out the contract, will bring an action to enforce its covenants. *I can see no reason why this principle should not apply to a lease as well as to any other contract which is in its nature executory, or which contains obligations to be performed in the future. Undoubtedly in this case the plaintiff could under the covenants in the lease have re-entered and recovered from the defendant the difference between the rent reserved and the amount realized from the property. But upon what principle was the plaintiff confined to such a course? What was there to prevent her from treating this refusal of the defendant to enter into possession of the premises and comply with the conditions of the lease as a total breach, and sue him for the damages thereby sustained?"*

From this ruling, the defendant appealed and the Court of Appeals rejected the entire argument of the Court below.

The Court of Appeals ruled that at common law the landlord could not treat non-payment of rent and repudiation as a breach of the entire lease, and consequently that plaintiff could not at once sue for damages for breach of the entire lease. The Court ruled that plaintiff's only remedy was that provided by the lease, namely, to sue for month to month as a deficiency between the agreed rental and the amount collected from the premises appeared.

The Court of Appeals at pages 408, 409, said:

"We do not sustain the theory upon which the majority of the learned judges of the Appellate Division proceeded to judgment, to wit, that an action will lie for the breach of the lease as an entirety and the recovery of all the damages in a single action brought before the expiration of the term. The breach of an agreement to pay money in installments is not a breach of the entire contract and will not permit a recovery of all the damages in advance

(Wharton & Co. *v.* Winch, 140 N. Y. 287; Moore *v.* Taylor, 42 Hun, 45.) So far as appears, the failure to pay the rent was the only breach of which the defendant was guilty, for he was under no legal obligation to occupy the demised premises. Even if he refused to recognize the lease as in force, because, as he claimed, the plaintiff failed to make the alterations provided for, this was not a violation of any covenant that he had entered into. His breach consisted simply of a failure to pay money in monthly installments. In Wharton & Co. *v.* Winch (supra) it was held that where a contract for railroad construction provides for payment in installments as the work progresses, a failure to pay an installment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further and to recover the profits which he would have earned had the contract been fully performed. So if a mortgagor refuses to pay the installments as they fall due upon a mortgage given by him, and even if he refuses to recognize the mortgage as in force for some reason, the mortgagee cannot, in the absence of a special provision permitting it, call the whole mortgage due upon the ground of an entire breach.

"There seems to be a distinction, whether well grounded in principle or not, between a contract for the payment of money in future installments and a contract for the delivery of goods in future installments (Nichols *v.* Scranton Steel Company, 137 N. Y. 471), as well as a contract for future employment and service. (Howard *v.* Daly, 61 N. Y. 362.) We think that the contract before us should be governed in this respect by the principle laid down in Wharton & Co. *v.* Winch (supra)."

And then the Court added the following most significant statement:

"Aside from this, however, when the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages and agree when they are to be paid, the remedy thus provided must be exclusively followed."

Thus with respect to the effect of the covenant to pay damages at the end of each month, the Court held that there could be no recovery until the damages had actually accrued and then only in the mode provided for in the covenant itself. This case has been cited with approval in later New York Cases. And the same principles have been held applicable in a case where a covenant provided for "indemnity" rather than for the admeasurement of damages at the end of each month.

Hermitage Co. v. *Levine*, 248 N. Y. 333.
In re Wise Shoes, Inc., 2 Fed. Supp. 521, affirmed without opinion 64 Fed. (2d) 1023.

So also in the instant case the claims cannot be proved and allowed because to do so would be contrary to the contracts between the parties which expressly provided for damages measured by the loss actually to be suffered in the future as determined by a reletting. Obviously before any payment can be made to these claimants, their contract requires that this loss must be ascertained.

Thus in at least two equity receiverships in the lower federal courts, claims similar to those of the creditors here, were held not provable on the ground just stated.

In the Equity Receivership of J. M. Gidding & Co. in the Southern District of New York (Charles H. Mears, plaintiff, against J. M. Gidding & Co. Inc. defendant, Equity 27-141), the landlord filed a claim upon a lease containing a covenant practically identical with that in No. 505. The claim of the landlord and the Receiver's objections thereto were referred to the late Wallace Macfarlane of the New York Bar as Special Master. His report disallowing the claim (to which no exception was taken), although only the report of a Special Master, is quoted in part below because of his preeminence at the New York Bar and the clarity and force of his reasoning. The opinion in its entirety is annexed hereto at page 58.

In that case, a claim for $36,497. was filed for damages representing the loss for the unexpired term. The Master said:

> "This item of $36,497. represents the excess of the total rent reserved for the unexpired term over the alleged estimated value thereof, which is stated in the claim (Ex. 1, subd. 13) to be $13,000. per annum. It is expressly claimed, however, as damages sustained by the lessor under the lessee's covenant to continue to be liable after the termination of the lease for a sum equivalent to the amount of all the rent reserved in the lease less the avails of reletting, *such damages to be due and payable by the* lessee on the several rent days specified in the lease (claim, ex. 1., subds. 11-13).
>
> "The receiver has objected to this item on the ground that the lessee's covenant for continuing liability after reentry of the landlord provides specifically not only that the measure of damages should be the equivalent of the difference between the rent reserved and the avails of reletting, but also that such damages, so measured, '*should be due and payable by the lessee to the lessor upon the several rent days hereinbefore specified*', that is to say, on the first days of June, September, December and March in each year; that this provision was exclusive of any other measure of damages, *and that the lessor was not entitled to claim a present lump sum equal to the excess of the total rent reserved for the unexpired term over the present value of such a lease for the years it has still to run determined by expert testimony.* * * *
>
> "It seems to be ADMITTED in the briefs filed with the master on behalf of the claimant that if her right to damages must be determined by the language of the lessee's covenant for continuing liability, the claim now made by her under that covenant will not be provable; but it is argued that the receivership and the insolvency of the lessee constitute an *anticipatory breach* of this covenant, relieving the lessor from its provisions in respect to payment of damages and entitling her to prove her whole damages as of the present time in a lump sum on the basis of a comparison between the present value of the unex-

pired term and the rent reserved for the seventeen years that the lease has still to run. * * *

"The lessee's alleged 'anticipatory breach' of the covenants of the lease to pay rent and taxes and perform other obligations as tenant, was a consequence of its insolvency and the receivership. The lessee thereby became unable, and the receiver refused, to perform any longer the covenants of the lease imposing obligations upon the lessee as tenant. This breach led to the termination of the lease and the annulment of the relation of landlord and tenant. The termination of the lease and the reentry by the landlord through summary proceedings brought into active operation the agreement continuing the personal liability of the lessee, which, though contained in the lease, was wholly unconnected with the use of the land. This special agreement provides with completeness and precision just what the continuing liability of the former tenant for damages should be, how the damages should be ascertained and even when they should become due and payable. Without this special agreement, the tenant, after the reentry of the landlord by summary proceedings would have been under no further liability at all arising out of the lease proper. (C. P. A. 1434, *Hall* v. *Gould*, 13 N. Y. 127; *Michaels* v. *Fishel*, 169 N. Y. 381, 387; *Gardiner* v. *Butler*, 245 U. S. 603.

"To say that the anticipatory breach arising from the receivership, as a consequence of which the landlord reentered and annulled the lease, was also a breach of the special agreement of the parties providing what their respective rights and liabilities should be upon such a reentry for such a breach, is an untenable argument. The anticipatory breach in this case affected the special agreement for continuing liability only by giving it vitality and operative effect. * *

"As already shown, the alleged anticipatory breach resulting from the insolvency of Gidding & Co. and the appointment of a receiver, was not a breach of the covenant for continuing liability but operated, through the consequent annulment of the lease, to make that covenant effective. * *

"Other authorities cited in the briefs, while deciding questions analogous to that presented by this

claim, are clearly distinguishable. Those that involve the construction of a lessee's covenants for continuing liability after reentry of the landlord and termination of the lease necessarily turn upon the form of the covenant, and it will be found that apparent differences in the decisions are satisfactorily explained and reconciled by comparison of the covenants involved. In *Filene's Sons Co.* v. *Weed*, 245 U. S. 598 and in the first claim allowed in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, the lessee agreed, in the event of reentry and the termination of the lease, to pay the difference between the rental value and the rent and other payments named in the lease for the residue of the term. These covenants were, as the court held, agreements between the parties that the evicted lessee should be liable for a present payment computed according to the familiar rule of damages accruing to a lessor for loss of the profits of the unexpired term. In such cases, the contract provides for a present claim determined precisely in accordance with an agreed rule. On the other hand, where the case presents a covenant which provides that the tenant shall remain liable during the unexpired term for the amount, or the 'equivalent' of the amount, of all the rent reserved less the avails of reletting, without any provision for periodic settlements, the decisions hold with substantial uniformity, that the lessor has no right of action until the completion of the unexpired term, because until that time comes it is impossible to determine what the damages will be, or whether there will be any damages at all. (*Seidlitz* v. *Auerbach*, 186 App. Div. 7, 13 rev. 230 N. Y. 167; *Matter of Hevenor*, 144 N. Y. 271; *Harding* v. *Austin*, 93 App. Div. 564). Substantially similar are the bankruptcy decisions upon covenants which take the form of an agreement by the tenant to indemnify the lessor during the residue of the term for loss of rent and other payments incurred by the termination of the lease. (*In re Ells*, 98 Fed. 967; In re Shaffer, 124 Fed. 111). • • •

"This item of damages, therefore, in the claim presented to the receiver should be disallowed, not because it is contingent and uncertain, but because it is contrary to the contract between the parties,

which expressly provides for damages measured by the difference between the rent reserved and the rent actually received from time to time on reletting, to be ascertained and paid quarterly. Obviously, before it can be paid, it must be ascertained. Undoubtedly, any claim in conformity with the contract covering any period except the quarter falling due March 1, 1924, would have been uncertain, and indeed impossible of estimation, and therefore wholly contingent, because the rents that would be received in future period could not be known and the avails of reletting might in many quarters exceed the rent reserved."

The same conclusion was reached by Circuit Judge Julian W. Mack, while sitting in the District Court in New York, in an unreported opinion in *Western Electric Co.* v. *Powers Accounting Machine Co.* Equity 19-150 copy of which opinion is annexed hereto at page 53. There Judge Mack in refusing to hold provable in equity a claim similar to that in No. 506, said:

> "Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they have provided that on such termination, when but for the provision no damages could be claimed, the lessee 'shall be liable for any loss or deficiency of rent which may be suffered.'
>
> "Not only is there therefore no basis for the claim as filed for the full reserved rent, but even if it were amended so as to charge an actual termination of the lease and in respect to damages therefor to assert, contrary to the contractual provisions a right to the difference between the rents reserved and the actual rental value at the time of termination, it would have to be disallowed."

From the principle affirmed in the *Gidding, Western Electric Co.* and *McCready* cases it follows that the petitioners here had no presently due and enforceable claim

which would have entitled them to bring an action in law or to prove in equity. Their claims were likewise therefore not provable in bankruptcy because as stated by Judge Lowell in *In Re Pettingill,* 137 Fed. 143, 147, and quoted with approval by this Court in the *Chicago Auditorium* case, supra, at page 592:

> "'The test of provability under the Act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent to disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under Section 63b (30 Stat. 562).'"

Under this test the petitioners have no claim provable in bankruptcy.

In the light of the foregoing authorities, it is evident that in face of the express covenants contemplating bankruptcy there is no *implied covenant* fixing the rights upon bankruptcy. It is also evident that the landlord may not ignore the express provisions of the leases and assert that bankruptcy gives rise to the anticipatory breach of an "implied covenant" and a present claim for damages.

The bankruptcy of a Tenant does not constitute an Anticipatory Breach of the Covenant to pay damages upon the bankruptcy of the Tenant inasmuch as that covenant only became effective because of the bankruptcy.

Both leases provide just how and when the damages contemplated by the parties following bankruptcy and reentry shall be measured and determined. *The parties have deliberately contracted that the actuality of the future and not the present estimate of future damages shall determine*

the amount of the damage. They both provide that the obligation to pay shall depend upon the actual future event. Neither provides, as it could have done, for a present claim either at the time of bankruptcy or at the time of reentry. *The covenant to pay which survives reentry does not become operative until the bankruptcy and the reentry.*

It is true, as already stated, that this court has held that the bankruptcy of a promisor of an executory bilateral contract constitutes an anticipatory breach of the promise because such insolvency and bankruptcy constitutes a breach of the implied undertaking in every promise that the promisor will not permit himself, through insolvency or bankruptcy or the like, from making performance. But how can such an undertaking possibly be implied in the covenant to indemnify against loss of rents when that very covenant was to come into effect upon the promisor's being disabled by bankruptcy? The parties in expressly providing that bankruptcy should bring into existence of the covenant of indemnification against loss, cannot be assumed to have impliedly provided that that self-same insolvency and bankruptcy should constitute a breach of the very covenant which it brought into existence.

It cannot, therefore, be seriously argued that the bankruptcy itself constituted an anticipatory breach of the very covenant to pay damages when that covenant to pay only became effective upon the very bankruptcy which is alleged to cause the anticipatory breach.

See

Mears v. *J. M. Gidding & Co., supra,* at page 21.
Western Electric Co. v. *Power Accounting Machine Co., supra,* at page 23.

Forms of Covenants Not Here Involved.

Leases of real property of course differ materially in their provisions with respect to the rights of landlords upon various "acts of default" by the tenant and it will be helpful, therefore, clearly to distinguish various other

classes of covenants which have been the subject of consideration by the courts, but which are wholly different from the covenants here involved. The provability of claims under such other covenants is not presented.

Class A. A lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the lease shall *ipso facto* terminate and that the landlord may reenter and that the tenant shall immediately be liable for all the rent for the balance of the term. A claim under such a provision was held by this Court not provable in bankruptcy in *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, upon the ground that the provision was for an unenforceable penalty and that the parties were undertaking to contract for a payment to be made out of the assets of a bankrupt estate, which payment would affect only those entitled to share in the proceeds of the property.

Class B. The lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the landlord *at his election* may *thereafter* re-enter and despite reentry and termination of the lease, the tenant shall *then* pay the difference between the reserved rental discounted and the market value of the lease. Such a claim was held provable in an equity receivership in *Filene's Sons Co.* v. *Weed*, 245 U. S. 597. It is to be noted that the covenant fixes a *present* measure of damages to be based on a prophesy of the future. Whether the claim would be provable in bankruptcy is not presented here.

Class C. The lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the landlord may *at his election* thereafter re-enter, and despite such reentry and termination of the lease, the tenant shall pay at the end of each month the difference between the reserved rental for that month and the actual avails of reletting for that month. Such a claim was held not provable in the equity receivership of *J. M. Gidding & Co. Inc., supra.*

Class D. The lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the landlord may at his election thereafter reenter and despite such reentry and termination of the lease, the tenant agrees to *indemnify* the landlord for any loss sustained over the residue of the term. Such a claim was held not provable in an equity receivership, (see the opinion of Judge Mack hereto annexed at page 53) and in bankruptcy in the well reasoned opinion of District Judge Patterson in the *Wise Shoe* case, *supra,* at page 19.

Obviously the cases now before this court fall within Classes "C" and "D", and for the reasons above indicated, these particular leases give rise to no provable claim in bankruptcy because the parties have deliberately contemplated bankruptcy and have provided what the remedy in the event bankruptcy shall be, and just how and when the claims shall be admeasured.

Whether or not a covenant can be drawn within the principles of *Kothe* and *Filene* cases which would give rise to a provable claim in bankruptcy is not presented by the record in these cases. Perhaps a covenant to the effect that upon bankruptcy a lease shall *ipso facto* terminate and the tenant shall be liable for the difference between the reserved rent discounted and the market value of the lease, would be a provable claim. That question is not here. Furthermore, it is not believed that the landlords would in general exact such a covenant for they do not desire that leases should terminate *ipso facto* upon bankruptcy. They prefer to reserve an election and to determine their course after bankruptcy; and they prefer after such election to have the tenant's covenant despite its bankruptcy to pay at the end of each month or at the end of the term the actual damages sustained rather than to have a present claim based upon present speculation as to future damages. In the event of composition or reorganization their position under such a covenant would be extremely desirable. In other words, they have preferred that the

liability of the tenant shall continue after bankruptcy, subject to their option to terminate the lease, rather than to gamble upon the receipt in many cases of a small dividend and the dischargeability of the obligation. They should be held to their bargain. Having deliberately exacted and accepted such a covenant, they cannot, as is so forceably pointed out in the opinions above referred to, now because of present conditions, seek by ingenious argument to avoid the very results of their own exactions.

Validity of the Covenants for Damages.

The question must not be overlooked, however, as to whether the instant covenants are valid, and if invalid the effect thereof.

The question is whether these covenants are contrary to public policy in that they attempt to keep alive obligations which would otherwise be discharged upon the reentry of the premises by the landlord, or putting it another way, whether they provide an unlawful penalty for going into bankruptcy.

Discharge in bankruptcy releases a bankrupt from his provable debts (Bankruptcy Act Section 17). There is authority to the effect that it would be repugnant to the purposes of the Bankruptcy Act to permit the circumvention of its object by the simple device of a clause in the agreement out of which a provable debt springs stipulating that a discharge in bankruptcy will not be pleaded.

Federal National Bank v. *Koepel,* 253 Mass. 157;
In re Weitzen, 3 Fed. Supp. 698 (S. D. N. Y.).

It is believed that this salutary principle is inapplicable to the present situation, and even if applicable cannot give rise to a provable claim, for the following reasons:

The existence and provability of claims is determined as of the date of the filing of the petition. At that time, the tenant is in possession. The tenant if he sees fit may remain in possession and pay unless the landlord reenters under the covenant. Accordingly, it is the reentry under

the covenant, after the filing of the petition which gives rise for the first time to the obligation to pay damages. This obligation did not exist at the time of the filing of the petition, and accordingly was not a provable or dischargeable claim. If the bankrupt sees fit despite his discharge from provable debts to assume such an obligation, he is not running counter to the policy underlying the bankruptcy law. See *Zavelo* v. *Reeves, supra,* page 10.

Furthermore even if the covenant to pay damages after reentry to be measured and paid at the end of each month or at the termination of the lease is for any reason held void, nevertheless the position of the petitioners is not improved. The invalidity of the express covenant could not in any event result in an *implied* covenant not to go into bankruptcy so as to give rise to a provable claim. See *Miller* v. *Schloss,* 218 N. Y. 400, 406, *supra.*

Conclusion of Point II.

It is submitted, therefore, that it has been shown that petitioners had no provable claim upon the filing of the bankruptcy petition for the following reasons:

(a) The express covenants of the parties preclude a consideration of the question whether under the doctrine of the *Chicago Auditorium* case, there is an implied covenant in a lease against going into bankruptcy which is breached by the bankruptcy and which gives rise to a present claim.

(b) The express covenants of the parties do not give rise to a present provable claim because contractually the parties have agreed that there shall not be a present provable claim at the time of bankruptcy or reentry, but that the actuality of the future and not the prophesy of the present shall determine what if anything shall be paid by the tenant.

(c) That bankruptcy cannot constitute an anticipatory breach of the covenants to pay damages which become effective only upon bankruptcy.

POINT III.

If the petitioners' proof of their claims is not barred by the covenants of the leases, nevertheless petitioners' claims are so contingent in existence and amount that they are not provable.

It must be emphasized that the claims here involved are not for future rent but, inasmuch as the landlords have re-entered, for future damages.*

> *Hermitage Co.* v. *Levine*, 248 N. Y. 333;
> *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28;
> *Grommes* v. *St. Paul Trust Co.*, 147 Ill. 634, 642.

There is no question here of provability of contingent claims because the parties have expressly covenanted as to when and how the damages if any are to be ascertained in the event of bankruptcy and re-entry by the landlord. The time for such ascertainment had not arrived at the time of bankruptcy. If the Court now should permit proof of this claim it would be attempting to measure the damages by a method contrary to that agreed to by the parties. And this the Court should not do as pointed out *supra* in Point II.

If however the foregoing argument be deemed unsound then nevertheless the claims here sought to be proved are contingent. The only possible claims which the petitioners had at the time of bankruptcy were those arising upon the covenants which survived re-entry. But at that time these claims were contingent both in existence and valuation. At the time of bankruptcy they were contingent in existence on the occurrence of two events 1) re-entry by the landlord 2) the *actual* (not the presently estimated) amount of rent thereafter received for the leased property for the balance of the term, which amount deducted from the reserved rental would measure the *actual* future loss, if any. They

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* If it were a claim for rent, *qua* rent, and were provable as such, the balance of the term would belong to the trustee in bankruptcy. *Wilson* v. *Penn. Trust Co.*, 114 Fed. 742; *Lamson etc. Co.* v. *Bowland*, 114 Fed. 639; *McCall Co.* v. *Deuchler*, 174 Fed. 133.

likewise were contingent as to valuation on the occurrence of these same events.

In *Re Merrill & Baker,* 186 Fed. 312 approved in *Maynard* v. *Elliott,* discussed hereafter at page 44, the claim was deemed contingent because it was wholly uncertain at what price the collateral which was the primary fund out of which the debt was to be paid, could be sold. In the present case the claim was likewise contingent at the time of bankruptcy because it was wholly uncertain whether the lessor would re-enter and if so, at what price the leased premises would *actually* re-rent over a period of years.

It now will be shown:

(A) Congress did not intend claims contingent in character to be provable under the Act of 1898; and

(B) Under the decisions of this Court, such claims so contingent are unprovable.

A.

Congress in enacting the Bankruptcy Act of 1898 did not intend to make contingent claims, such as here involved, provable in bankruptcy. The express provisions for the proof of contingent claims in the 1867 Act were omitted from the Act of 1898 and cannot be put back by construction.

This question does not seem to have been considered in any case. It "lurked in the record", but was not argued or decided in *Maynard* v. *Elliott, infra.* In *Webster* v. *Fall,* 266 U. S. 507, 511, this Court said:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

A careful consideration of the provisions of the Act of 1898 in connection with the provisions of the Act of 1867 must lead to the conclusion that only claims absolutely owing at the time of the filing of the petition, although then not payable, are provable under the 1898 Act. An analysis of the sections of the two Acts with respect to what claims are provable will reveal that the 1898 Act has taken over

all provisions from the 1867 Act with respect to what claims are provable, except the provisions of the 1867 Act providing for the proof of contingent claims.

The Act of 1867 is found in 14 Stat. 525, Chapter 176, and the provision as to what claims were provable is found in Section 19 thereof. Thereafter this Act of 1867 was included in the Revised Statutes of 1873, and Section 19 of the Act of 1867 providing for provable claims appears as Sections 5067 *et seq.* of the Revised Statutes. The applicable provisions of the Revised Statutes read as follows:

> "Sec. 5067: All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy and all debts then existing but not payable till a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate."*
>
> "Sec. 5068: In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in dividends, if the contingency happens before the order for final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such man-

*Originally in Sec. 19 of the Act of 1867 before being revised, the three sentences of Sec. 5067 each appeared as a separate paragraph. The first two sentences constituted paragraphs one and two of Sec. 19 and the third sentence appeared as the eighth paragraph of Sec. 19. When the revision was made at the direction of Congress, the revisers apparently thought that the sense of these three sentences required that they be placed together.

ner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

"Sec. 5069: When the bankrupt is bound as drawer, endorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract or for any debt of another person, but his liability does not become absolute until after the adjudication in bankruptcy, the creditor may prove the same after such liability becomes fixed, and before final dividend is declared."

"Sec. 5070: Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, discharge of the whole shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders."

"Sec. 5071: Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

Sec. 63 of the Act of 1898 reads as follows:

"a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and

which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less cost incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Comparison of these two Sections makes it clear that Section 63(a) (1) and (4) and Section 63(b) are substantially the same as the provisions of Revised Statutes, Section 5067. This is made clear when the said Sections are put in parallel columns as follows:

Act of 1867. Revised Statutes, Sec. 5067, 14 Stat. at Large 525, c. 176, Sec. 19.	Act of 1898. 30 Stat. at Large 562, Sec. 63.
"All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable till a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken	"a Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate in interest upon such as were not then payable and did not bear interest; * * *; (4) founded upon an open account or upon a contract expressed or implied; * * *.

or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate."

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 63(b), of course, does not enlarge the class of claims provable under Section 63(a), but merely provides for a method of liquidation, and the only claims under Section 63(a) that require liquidation are those provided for in clause 4. See *Schall* v. *Camors*, 251 U. S. 239. As a consequence Section 63(b) and Section 63(a) (4) really should be read in conjunction as follows "unliquidated claims against the bankrupt, founded upon an open account, or upon a contract express or implied, may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

It therefore clearly appears from the foregoing that the second and third sentences of Section 5067 were substantially carried over into the Act of 1898 and are now to be found in Section 63(a)(4) and Section 63(b). The only changes made in the transition were two: first, the second sentence of Section 5067 providing for the proof of claims in conversion was replaced by the provision in Section 63(a) (4) for claims founded upon "implied contract", i. e., claims in quasi contract based upon a waiver of the tort (*Schall* v. *Camors*, 251 U. S. 239); and, second, that the words "unliquidated damages" in the third sentence of Section 5067 were replaced by the words "unliquidated claims" in Section 63(b). The first of these changes re-

quires no comment because it is clear that an action upon implied contract arising from waiver of the tort is the same as an action for unliquidated damages for a converted chattel. The second of these changes obviously was made because required by the first change. There cannot be a claim for unliquidated "damages" based on an implied contract and therefore Congress used the word "claims".

It is next to be pointed out that the provisions of Section 5070 providing for the proof of claim by sureties in the name of the creditor are now found in Section 57(i) of the 1898 Act and General Order XXI, subdivision 4.

It thus appears that there have been omitted from Section 63 of the present Act any provision at all equivalent to the provisions of Sections 5068 and 5069 of the Revised Statutes providing for the proof of contingent claims; and there have also been omitted the provisions for the provability of a proportionate share of rent as found in R. S. 5071.

The conclusions from these deliberate inclusions and omissions are entirely clear; it cannot be doubted but that the able lawyers who had the question of a new Bankruptcy Act under consideration for years prior to its enactment and who had knowledge of the provisions of the 1867 Act and the provisions thereunder, deliberately omitted the express provisions for the proof of contingent claims as found in the 1867 Act. Moreover the Bankruptcy Law of Great Britain then in force and all prior ones had contained specific provisions with respect to contingent claims and the precise method of their ascertainment and these had been strictly construed. 46 and 47 Vict. C. 57 (1883); *Williston,* Cases on Bankruptcy (2nd Ed.), note pp. 480, 481, 32 and 33 Vict. C. 71 (1869).

Congress having copied into the Act of 1898 the provisions for the proving of claims on contract; having provided for the proof of implied contracts as the equivalent for the proofs of claim in tort arising out of unjust en-

richment; having provided for the liquidation of unliquidated claims arising upon contracts; and having deliberately omitted all reference to contingent claims, it cannot be successfully argued that it was intended by *mere implication* to extend the meaning of the language thus substantially copied from the earlier Act to include contingent claims. Having omitted all reference to contingent claims, Congress did not intend to "smuggle in" those very provisions "by muffled words."*

The question as to the effect of the deliberate omission from the 1898 Act of provisions found in the 1867 Act has been before this court in several cases. Thus in *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, was involved the question of the right of a creditor to prove a claim after innocently receiving a preference, without returning the property thus received. The court first quoted the provisions of the Act of 1867 which stated that any person who accepted a preference having reasonable cause to believe that the same was made or given by the debtor contrary to the provisions of the Act could not prove the debt, until the preference was surrendered. And the court italicized the following words "having reasonable cause to believe that the same was made by the debtor". The court then said at page 448:

> "The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. **Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued usually its words are, and an omission of the words implied an omission of the purpose.** This rule we lately applied in Bardes *v.* First National Bank of Hawarden, 178 U. S. 524. In that case, in determining whether the jurisdiction of the Circuit and District Courts of the United States was con-

*See Mr. Justice Holmes in *Davis* v. *Pringle*, 268 U. S. 315.

> current with the state courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841* and 1867 were compared with that of 1898, and from the omission from the latter of certain provision of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: 'We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.' ''

Language more appropriate to the present situation could not be conceived.

See, too, *Davis* v. *Pringle*, 268 U. S. 315, which discussed the effect of changes in the 1898 from similar provision in the Act of 1867 with respect to priority to be accorded debts due the United States and similarly refused to incorporate by implication and construction into the 1898 Act provisions expressly set forth in the 1867 Act but not brought over into the Act of 1898.

One further fact is to be emphasized. Section 5068 particularly provided that the creditor may at any time apply to the court to have the present value of the contingent debt or liability "*ascertained* and liquidated" and *in addition* provided for the liquidation of damages in Section 5067 on presently due claims on contract. The Act of 1867 thus made a distinction between the ascertainment and liquidation of claims and provided that contingent claims should be "ascertained" whereas presently due claims for damages should be liquidated. The Act of 1898 however provides only for the liquidation of claims and that is the same provision which was already in the 1867 Act in addition to the provision for ascertainment and liquidation. As said in *Guarantee etc. Co.* v. *Title Guaranty & S. Co.*, 224 U. S. 152, all of these changes were not "inadvertent".

*The Bankruptcy Act of 1841 also contained provisions for the allowance of Contingent Claims. (5 Stat. 440, Section 5).

In addition, Congress must have known that Judge Lowell, who was probably the most learned of the Federal Judges interpreting the Act of 1867, had held that claims for rent and damages under leases were not provable despite the general provisions for the proof of contingent claims in the Act of 1867.

Ex-parte Houghton, 1 Lowell 554.

They also knew that as early as 1882 Judge Lowell himself had prepared a bill specifically providing for the allowance of claims growing out of leases, and yet no provision of any kind covering this subject was included in the 1898 Act.

See

H. R. Rep. 65, 55th Congress, Second Session, page 28 (1898);

See

The Lowell Bill, S. 1382, introduced in the 47th Congress, Second Session in 1882, and set forth in 14 Congressional Record, pp. 43-49.

At page 28 of the said House Report 65, it was stated:

> "When the agitation of a new bankrupt law began some years ago, Judge Lowell of Massachusetts drew a bill which attracted the general attention of the country. In the West and South, however, it was believed to be too severe in some of its views. Out of the discussion among friends of bankruptcy legislation grew the Torrey bill. Judge Jay L. Torrey, a Western man, gave the subject special attention, and presided over three national conventions held to discuss and perfect a bankruptcy bill. His bill was submitted to many jurists and lawyers East, West and South, and the result was a bill believed to be free from the severe features of former laws and other proposed legislation."

The Lowell Bill of 1882 above referred to and with which Congress was evidently familiar contained the fol-

lowing provision with respect to what claims were provable:

> "Sec. 60: That the following debts and liabilities, and no others, shall be provable in bankruptcy: * * *; all damages suffered by reason of the rejection by the trustee of a lease, as hereinafter provided; * * *.
>
> "LEASES—RENTS.
>
> "Sec. 61: That the bankrupt shall not be entitled to the benefits nor be bound by the covenants or engagements of any lease held by him at the time of his bankruptcy, but such lease shall be deemed to be surrendered so far as he personally is concerned. The trustee may decline the lease at any time, notwithstanding that he may have endeavored to sell the same, or have exercised acts of ownership in respect thereto: *Provided,* That the landlord or any creditor may, in writing, require him to elect, within twenty days after such notice, whether to accept or decline the same; and the failure to accept within such time shall be deemed a declination. When a lease is declined, the landlord may have any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in bankruptcy. Such declination shall not affect any right of the trustee to deal with fixtures belonging to the bankrupt."
>
> "And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same, or any part thereof, may if the creditor fails or omits to prove such debt, prove the same in the name of the creditor, if known, if not, in his own name, and the Court shall take care that the dividend is so paid as to diminish the original debt."

The reports of the committees in Congress have been examined and beyond the extent indicated throw no light on the question. They do not show that in using the words "founded on open account or on contract express or implied", Congress intended to re-enact by indirection and by implication the express provisions of the 1867 Act with

respect to contingent claims, and by those general words to "smuggle in" every possible kind of a contingent debt expressly provided for, both as to provability and method of "ascertainment", in the 1867 Act.

As said by Mr. Justice Holmes in the *Filene* case, 245 U. S. 597, 601:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe."*

Finally it is to be noted that consistent with its omission of contingent claims from Section 63 Congress provided in Section 57*a* that proofs of debt shall set forth "that the sum claimed is justly *owing* from the bankrupt to the creditor."

In view of the foregoing, it is submitted that Congress in 1898 deliberately omitted the provisions for proving contingent claims contained in the 1867 and 1841 Acts and that these provisions, to use the language of the *Pirie* Case, 182 U. S. 438 cannot be put back by construction. Contingent claims such as are here involved were not intended to be either provable or dischargeable under the Act of 1898.

B.

1. The decisions of this court and the lower Federal courts clearly establish that claims which will become due and enforceable only upon the occurrence of a contingency not reasonably certain to occur are not provable.

Until the recent case of *Maynard* v. *Elliott*, 283 U. S. 273, no one could have contended that claims such as those of petitioners were provable. Petitioners in effect contend however that the *Maynard* case makes all claims founded upon a contract provable under clause 4 of Section 63a, regardless of whether it is uncertain at the time of the bankruptcy whether the claim will ever mature and become pay-

*Another application of this principle is found in the cases of *Davis* v. *Pringle*, 268 U. S. 315 and in *Price* v. *U. S.*, 269 U. S. 492. In the former a debt due the United States was denied priority in bankruptcy whereas in the latter such a debt was granted priority in an equity receivership.

able and enforcible. Under this interpretation, *Maynard* v. *Elliott* was certainly an astounding departure from all the past rulings of this court under the 1898, 1867 and 1841 Acts. This interpretation is unsound, however. *Maynard* v. *Elliott* did not lay down any such broad rule. Indeed *Maynard* v. *Elliott* is entirely consistent with the previous decisions of this court.

After all, claims absolutely owing though not payable are contingent in a certain sense; they are contingent on the element of time. This contingency, however, since it is one certain to occur, has specifically been declared by Congress to be unimportant and one to be disregarded. (see Sec. 63(a) 1.)

Claims are, however, frequently contingent on some event other than time. Where the occurrence of such contingencies is entirely within the control of the creditor, it is exactly similar in nature to the contingency of time. For all practical purposes such a contingency like the contingency of time, is certain to occur because the creditor, it may safely be assumed, will see that it does occur. So also whether a claim will become absolutely due and payable frequently depends on the occurrence of some other contingency which experience shows is for all practical purposes certain to occur.

Where the enforcibility of claims is dependent upon a contingency so like in nature to the contingency of time, there is no legal or practical reason for treating it differently from a claim contingent on the element of time. There is certainly no reason to suppose that Congress meant to draw a distinction between debts certain to occur, which are dependent upon the contingency of time, and debts certain for all practical purposes to occur which are contingent on some other element.

As a consequence this court in *Williams* v. *Fidelity Co.*, 236 U. S. 549, held a claim provable because it was reasonably certain so to become, though at the time of bankruptcy it was neither due nor payable; and this even though the contingency was not within the control of the creditor. In that

case, a surety's claim against a bankrupt was held provable and discharged even although the surety agreement was one of indemnification and the surety had not paid the creditor at the time of the filing of the petition. In that case, however, it was certain at the time of the filing of the petition that the surety would have an enforceable claim against his bankrupt principal because his principal had before bankruptcy breached the principal obligation and was then insolvent and experience shows that creditors whose principals are insolvent usually pursue the surety.

Maynard v. *Elliott,* supra, merely marks another application of this same narrow doctrine. The claim there was one contingent upon the occurrence of something entirely within the creditor's control. The claim was one which would become enforcible and payable at the election of the creditor. As revealed by the record,* the *maker* of the note was already *discharged in bankruptcy* at the time of the filing of the petition in bankruptcy against the indorser and all that the creditor would have to do in order to make his claim enforceable, would be to give notice of dishonor and protest.** It is true, of course, that the opinion does not disclose specifically the fact that the maker was already insolvent, but that the court was aware of this fact and was merely applying the narrow doctrine stated above is amply clear from the opinion which states that the contingency of notice of dishonor was within the control of the creditor and *implies that this was the only contingency preventing the claim from maturing.* Had the Court not been aware of the maker's insolvency, it is little likely that it would have said that the creditor's claim was certain to become enforceable upon the giving of notice of dishonor and presentment. It is submitted moreover that the court did not mean to hold that the possible insolvency of the maker at the maturity of say a ten-year note who was entirely solvent at the time of the indorser's bankruptcy was a contingency within the creditor's control.

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* See Transcript of Record of that case at pages 11, 17 and 26.
** Even this the Court finally said was unnecessary, 283 U. S. at 279.

That the Court in *Maynard* v. *Elliott* recognized the narrow limitation of the doctrine which it was expounding is made even more clear from the following quotation:

> "That some contingent claims are deemed not provable does not militate against this conclusion. The contingency of the bankrupt's *obligation* may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. *In re Merrill & Baker,* 186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. *Riggin* v. *Magwire,* 15 Wall. 549." See 273 U. S. at 278.

The Court thus made it clear that claims contingent in existence upon the occurrence of events not reasonably certain to occur because not within the control of the creditor or because their occurrence is shown by experience to be too fortuitous, are not to be treated the same as debts absolutely owing but not payable because dependent upon the contingency of time. Such claims, said the court, are not provable and the cases cited by it amply bear it out.

In *Merrill & Baker,* supra, an obligation was secured by collateral and the creditor agreed to pay the difference between the face of the obligation and the actual amount realized from the sale of the collateral, if not paid by the bankrupt. This claim was held contingent and not provable and this Court in the quotation above said that this was so because the contingency was beyond the control of the creditor and dependent upon an event so fortuitous as to make it uncertain whether liability would ever attach. As pointed out above the claims in the cases at bar are equally dependent upon a fortuitous event namely, the amounts for which the leased premises will be actually re-rented during the balance of the term.

So also the claim in *Riggin* v. *Magwire,* 15 Wall. 549, which arose under the Act of 1841 (which specifically provided for the proof of contingent claims) was held not prov-

able because it was not reasonably certain at the time of the bankruptcy whether it would ever become due and payable. In that case the creditor's claim would become payable only if the bankrupt's wife survived the bankrupt. This Court held this claim not provable because at the time of bankruptcy it was unpredictable whether the wife would survive.

Another case which the court might well have cited for this same proposition is *Dunbar* v. *Dunbar,* 190 U. S. 340. There the bankrupt would become liable only if his former wife remained single and, therefore, at the time of bankruptcy it was impossible to predict whether the bankrupt would ever become liable. The court therefore held that the claim was not provable and therefore not dischargeable.

So in this case whether the petitioner's claims will ever become due and payable was unpredictable at the time of bankruptcy. There was no reasonable certainty that even if there was a reentry there would be an actual loss, inasmuch as under the covenants here the existence of an actual loss would depend upon the actual amounts at which the properties would actually be relet.

2. The decisions of this Court and the lower courts also clearly establish that claims which are speculative in amount are not provable. The bankruptcy courts have always refused to substitute their present prophecy of the future for the actuality of the future.

In *Maynard* v. *Elliott, supra,* the Court took particular pains to point out that if a claim was so speculative at the time of the bankruptcy that there could be no valuation, it was not provable. It stated that the amount of a claim might be dependent upon the occurrence or non-occurrence of contingencies and that if it was impossible to predict whether the contingency would occur, the court would not speculate on the possible amount of the claim which the creditor might have. It said:

> "Or, the contingency may be such as to make any *valuation* of the claim impossible, even though

> liability has attached. Of this latter class was the claim upon the bankrupt's contract to pay his divorced wife a specified amount annually so long as she should remain unmarried, proof of which was for that reason rejected in *Dunbar* v. *Dunbar, supra;* see *Atkins* v. *Wilcox*, 105 Fed. 595." 273 U. S. at 278.

The case cited by the court, *Dunbar* v. *Dunbar, supra,* is directly in point and decisive of this case. As already pointed out the claim there was contingent in existence on whether the wife would remain single. It was also therefore contingent in amount because the amount of the claim would depend on how long the wife remained single and that was unpredictable at the time of bankruptcy.

Petitioners contend that courts often exercise and pass judgment on the future acts or events in estimating damages and that there is no reason why they cannot do the same here. That same argument was applicable in *Dunbar* v. *Dunbar* and in the other cases analyzed above. It might there have been argued that juries frequently assess damages for mental suffering and that that is more speculative than estimating how long and whether a woman is likely to remain unmarried. There are statistics on that. Indeed in *Dunbar* v. *Dunbar* the argument was made that in England a court had already made an estimate as to how long a woman would remain unmarried.

Despite this the court refused to hold the claim in the *Dunbar* case provable. There must have been a reason and it is submitted that it is this. The cases to which petitioners point as analogy, as being cases where the courts have exercised their judgment for the future, are cases where plaintiff had a present enforceable cause of action. In such case, a court has no alternative but to use its estimate of the future. Plaintiff possessing a present cause, the court in all justice must guess. Indeed if it does not the Statute of Limitations may run. But when he has not a present but a future cause, courts refuse to guess. They refuse to substitute their prophecy of the future for the actuality of the future and remit claimant to that actuality.

This Court refused to make such a prophecy in *Dunbar* v. *Dunbar* and in the cases analyzed above.

No case has been found in this Court where a claim contingent both as to existence and valuation was held provable. *Dunbar* v. *Dunbar* and *Riggin* v. *Magwire*, both *supra*, held that claims so doubly contingent must be remitted to the actuality of the future and are neither provable nor dischargeable. See also *In re Merrill & Baker*, 186 Fed. 312.

Conclusion to Point III.

It is submitted, therefore, assuming the court will reach this question despite the contention that these claims are contractually barred, that it has been shown that (1) Congress in enacting the Bankruptcy Act of 1898 and deliberately omitting the provisions respecting contingent claims contained in the 1867 Act and the British Act then in force did not intend contingent claims of this character to be provable and dischargeable and (2) that no decision in this court holds otherwise, but on the contrary that the decisions in *Merrill* v. *Baker* and *Dunbar* v. *Dunbar* clearly recognize that claims of this character are not provable.

POINT IV.

Petitioners' Brief.

The elaborate brief of the petitioners, with its wealth of citations, fails to discuss and meet the essential points involved in these cases. The brief in reality is based on the rather plaintive argument that claims for damages for the loss of future rents ought to be provable in bankruptcy, as the petitioners see the situation, and that therefore a way must be found to make them so. To reach their desired result, petitioners boldly ask this court to usurp the functions of Congress and to legislate amendments into the Bankruptcy Act so as to make it as broad and comprehensive as the provisions of the English Bankruptcy Act in

effect prior to 1898 (which act Congress did not deem it wise to follow) or as broad and comprehensive as the amendments tentatively proposed by the Committee referred to at pages 6 and 7, supra.

Petitioners ask the court to ignore—

(1) The solemn and unambiguous covenants of the parties fixing their rights;

(2) The law of leases established for centuries;

(3) The settled rule of construction of the Bankruptcy Act of 1898 resulting from the omission of the provisions of the Act of 1867 and the clear limitations upon the provability of claims as set forth in Sections 63 and 57 (a) of the 1898 Act.

(4) The applicable cases respecting contingent claims.

Having thus blithely brushed aside history, precedent and express provisions of the present statute, petitioners conclude that the court below erred—

> "in holding that the claim for damages for loss of future rent was not as a matter of law a provable debt."

Stripped of verbiage, the gist of their argument is this:

All the express covenants of the leases providing for forfeiture, reentry and damages are to be ignored and the following new rule established. If a tenant in possession of real estate becomes a bankrupt, the landlord in the absence of statute or express covenant may reenter the leased premises after bankruptcy and nevertheless have a provable claim for damages against the bankrupt and his estate. Perhaps that should be the law. If so, Congress will act in the future (See possible legislation, p. 7, supra).

Throughout their argument, however, petitioners ignore the fact that they *have* reentered and taken the property and thus terminated the lease. They urge that the situation is analogous to a breach of an executory contract by anticipation or otherwise. The argument, however, does not bear analysis. It ignores the nature of leases and the respective rights of the parties growing therefrom.

At common law, covenants of leases were independent and even actual failure to pay rent did not terminate the lease.

2 Tiffany on Landlord and Tenant (1910) p. 1364.
2 Williston on Contracts (1920) §890.
Michaels v. *Fishel,* 169 N. Y. 381.
Thompson-Houston Electric Co. v. *Durant Land Improvement Co.,* 144 N. Y. 34, 44.

A fortiori, therefore, bankruptcy was held not to terminate the lease. See Judge Mack's opinion in *Western Electric Co.* v. *Powers Accounting Co.,* annexed hereto at page 54.

Furthermore, ignoring for the moment the covenant of indemnification, reentry by the landlord upon breach of a lease pursuant to a covenant in the lease, operates both at common law and by the laws of New York today as a termination of the lease and *relieves the tenant and his estate from all claims for damages.*

1 Tiffany on Landlord and Tenant (1910) p. 1174.
Gardiner v. *Butler Co.,* 245 U. S. 603.
Hall v. *Gould,* 13 N. Y. 127.
McCready v. *Lindenborn,* 172 N. Y. 400.
Sutton v. *Goodman,* 194 Mass. 389.

Moreover in claiming a right at common law to terminate, reenter and claim for damages, not only do petitioners ignore the covenants of the parties and the law of leases stated above, but they also demand that the bankruptcy court treat them better than other creditors.

A lease is something more than an executory contract. It is, as stated by Judge Mack in the *Western Electric Co.* case a conveyance of an interest in real property, a chattel real. See infra at page 54. A lease is, therefore, like a contract, partially executed on one side, like a contract for the sale of personalty or realty in which the seller has transferred title and possession and the purchaser has not yet paid the purchase price. Upon repudiation by the buyer, the seller of personalty in the case supposed above could

sue for the purchase price if the time for performance had arrived.

3 Williston on Contracts (1920) § 1458;
1 Williston on Sales (1924) § 511.

Perhaps he also could rescind.

Ankeny v. *Clark*, 148 U. S. 345.

The seller of realty might perhaps rescind or sue for damages.

3 Williston on Contracts (1924) § 1456.

But neither could have both.

A creditor cannot both rescind, obtain restitution and sue for damages. He must elect.

Restatement of the Law of Contracts, § 384.
Joannes Brothers Co. v. *Lamborn et al.*, 237 N. Y. 207.
Clark v. *Kirby*, 243 N. Y. 295.
Cf. Grymes v. *Sanders et al.*, 93 U. S. 55.

There is no reason why landlord should be treated any differently and be permitted in effect both to rescind and claim damages.

It must also be noted that there cannot be an anticipatory breach of a lease under the law of New York.

McCready v. *Lindenborn*, 172 N. Y. 400;
Cf. Kelly v. *Security Mutual Life Ins. Co.* 186 N. Y. 16;
Cf. Nichols v. *Scranton Steel Co.*, 137 N. Y. 471.

Under the law of Nebraska the doctrine of anticipatory breach of any contract, much less a lease, is repudiated.

Carstens v. *McDonald*, 38 Neb. 858;
Following *Daniels* v. *Newton*, 114 Mass. 530.

The law of the Federal Courts, both of this Court and the lower Federal Courts is the same as to unilateral contracts.

Roehm v. *Horst*, 178 U. S. 1, 17;
Operators Oil Co. v. *Barbre*, 65 Fed. (2d) 857.

See also Restatement of the Law of Contracts §318.

The above rules of law which apply in the case of repudiation of the obligation to pay rent by a solvent tenant likewise apply in bankruptcy.

In re *Pettingill & Co.*, 137 Fed. 143 quoted with approval in *Central Trust Co.* v. *Chicago Auditorium Ass'n.*, 240 U. S. 581, 592. See page 24 supra for quotation.

The application of the foregoing principles of law to the instant cases leads to the following conclusions: Even if the covenants of the leases can be disregarded (of course they cannot be), nevertheless petitioners' claims are not provable because (1) reentry has precluded any claim for damages, and (2) even if there had been no reentry petitioners would have no claim for damages.

POINT V.

Section 74 of the Bankruptcy Act added in 1933 does not make the claims provable.

That section clearly applies only to claims filed in a debtor's proceeding for composition or extension. Furthermore that section provides that a claim for future *rent* shall constitute a provable debt and shall be liquidated under Section 63(b) of the act. The claims in the present cases are not for future rent but are for *damages*. If they were for future rent the balance of the term would pass to the Trustee in Bankruptcy as an asset of the estate. Here this cannot happen, for the landlords have reentered and are seeking damages. Furthermore the section is not made retroactive and could not be made so as to enlarge the classes of provable debts because it would unlawfully interfere with vested rights—namely the vested right in rem of a creditor at the time of the filing of the petitions long before the Statute was enacted. This vested right

was a lien upon such part of the property of the bankrupt as the amount of the creditor's provable claim bears at that time to the entire amount of the provable claims.

Board of Commissioners v. *Hurley*, 169 Fed. 92;
Chemical Bank v. *Armstrong*, 59 Fed. 372, 378;
Sexton v. *Dreyfus*, 219 U. S. 339, 345.

POINT VI.

Conclusion.

The underlying theme of petitioners' argument is the alleged injustice of the present law. That there is such injustice is denied. Injustice there might really be to creditors with certain claims against a bankrupt if these speculative claims were to be proved.

In any event the salutary principle enunciated by this Court in *New Jersey* v. *Anderson*, 203 U. S. 483, 490, is peculiarly apposite here:

> "But considerations of this character, however properly addressed to the legislative branch of the government can have no place in influencing judicial determination. It is the province of the Court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress."

The judgments of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

GODFREY GOLDMARK,
as *Amicus Curiae* on behalf of
IRVING TRUST COMPANY as
Trustee in Bankruptcy of McCrory Stores Corporation.

Opinion of Mack, J.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTERN ELECTRIC COMPANY, INCORPORATED, Complainant, *against* POWERS ACCOUNTING MACHINE COMPANY, Defendant.	E. 19—150

CLAIM OF PREN-BROOK CORPORATION.

MEMORANDUM OPINION.

MACK, Circuit Judge:

Defendant is lessee under three leases made before the completion of the building,—two for ten years from such completion and one for ten years from September 15, 1920. Rent was payable annually or quarterly in advance.

Receiver herein was appointed on October 18, 1920, on defendant's confession of insolvency and consent thereto. By agreement, with express reservation of lessor's right to terminate after October 8, 1921, under the clauses of the lease permitting termination in the event of the appointment of a Receiver of the tenant, October 8, 1920, was fixed as the date of the completion of the building. Rent for one year was paid. On October 8, 1921, the Receiver disaffirmed the leases without the lessor's consent; thereupon lessor, without accepting a surrender, took possession. Expressly

without prejudice to any claim, except to give credit for rent paid, lessor leased a portion only of the space to the Receiver from October 8, 1921 to October 1, 1922. Another portion was rented to another party for five years.

The claim as filed is for the rent reserved after crediting rents received or reserved under the relettings.

The leases provided:

> "That if at any time during the term above specified, the lessee should become insolvent, or a receiver of the lessee's property should be appointed, then in each of such cases it should and might be lawful for the lessor, at the lessor's election, into and upon the demised premises or property, or any part thereof, in the name of the whole, by process of law or otherwise, to enter and to have, hold, possess and enjoy the same, and to terminate said lease; and that the lessee in such case should be liable for any loss or deficiency of rent which might be suffered by the lessor during the remainder of the term above specified."

A lease of an interest in real property is the creation or grant of a chattel real; rent reserved is compensation for the enjoyment of the interest during the period for which the rent is paid or is payable; neither insolvency nor bankruptcy of the lessee affects the term created except as the title thereto, unless rejected, becomes the property of the Receiver or Trustee and the latter thereby is subjected to payment of the reserved rent. If the interest be not accepted by Receiver or Trustee either at once or retroactively after a period during which the advisability thereof is under consideration, the interest with the rental obligation remains in and on the insolvent or bankrupt. Insolvency or bankruptcy of itself creates no breach anticipatory or otherwise of the rent obligation because it does not terminate the leasehold estate.

In re Mullings Clothing Co., 238 Fed. 58, does not purport to and does not overrule *In re Roth & Appel*, 181 Fed. 667; it distinguishes the effect of dissolution from that of

the bankruptcy of a corporation, in that the former ends the corporation's existence: therefore, it is held to effectuate an anticipatory breach of the leasehold estate.

Neither bankruptcy nor equity proceedings under a creditors' bill legally ends the corporate life; indeed, it does not necessarily end its business career; a composition or reorganization or payment in full may be effectuated with or without a balance of assets for the corporation. There is no legal difference in this respect between a corporate and a personal lessee.

The parties may, however, incorporate an executory contract in the lease; that contract may, like other executory contracts, be broken by anticipation; such a breach may, under circumstances, give rise to a claim provable either in bankruptcy or in equity proceedings; it may indeed be deemed retroactive as of the date of the proceedings even if actually created by the subsequent exercise of an option exercisable because of or on the bankruptcy or appointment of a Receiver.

That the claim was contingent, uncertain or unliquidated at that time is not fatal to its proof, at least in equity proceedings, provided only that it can be made absolute, certain and liquidated within a reasonable time so as not to impede the settlement of the estate.

Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597.

If the leasehold interest, pursuant to some reserved right, is terminated on or because of the insolvency or receivership, the obligation to pay rent as such necessarily ceases, whatever right to damages may arise because of some contractual provisions incorporated in the document; if the leasehold interest is not terminated, the obligation to pay rent when and as it accrues remains on the lessee; in neither case, therefore, can a claim against the bankrupt or insolvent estate for the reserved rent as such be established.

Furthermore, if there be no contractual or statutory provision for damages on such a termination, there is no further liability either of the lessee or of the insolvent or bankrupt estate.

Gardiner v. *Butler,* 245 U: S. 603.

If, however,-there be a contractual provision for damages on such a termination and the measure of those damages fixed by the agreement be the difference at the time of a termination between the market value of the lease and the discounted value of the rents reserved, and if the termination be reasonably prompt so as to enable a liquidation of the amount before the time for filing proofs shall have expired, then at least in equity proceedings such a claim is provable.

Filene v. *Weed,* supra.

But, if as in the present case, on such a termination a lessee becomes liable not for an amount then ascertainable but for the entire loss that the lessor may actually suffer during the remainder of the original term, inasmuch as it is clearly impossible to ascertain that loss until the original term shall have expired,—in this case about nine years,—the claim must be rejected as uncertain.

In re Roth & Appel, supra.
Penn. Steel Co. v. *N. Y. City Ry. Co.,* 198 Fed. 721, 759.

Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they have provided that on such termination, when but for the provision no dam-

ages could be claimed, the lessee "shall be liable for any loss or deficiency of rent which may be suffered."

Not only is there therefore no basis for the claim as filed for the full reserved rent, but even if it were amended so as to charge an actual termination of the lease and in respect to damages therefor to assert, contrary to the contractual provisions a right to the difference between the rents reserved and the actual rental value at the time of termination, it would have to be disallowed.

Objections sustained and claim disallowed.

April 14, 1922.

JULIAN W. MACK,
U. S. Circuit Judge.

Opinion of Wallace Macfarlane, Special Master.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E 27-141.

CHARLES H. MEARS,
Plaintiff,

against

J. M. GIDDING & CO. INC.,
Defendant.

In the matter of the claim of

JANE SCHUYLER MORSE.

REPORT OF WALLACE MACFARLANE, SPECIAL MASTER.

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Pursuant to an order of this court duly made and entered herein on the 14th day of March, 1924, by which Wallace Macfarlane was appointed special master to take testimony with respect to claims filed herein to which objection should be taken by the Receiver, and to report to this court his opinion and recommendations with reference to such claims,—

I, the said special master, respectfully report as follows:

APPEARANCES:

MESSRS. ROSENBERG & BALL (Godfrey Goldmark, Esq., of counsel) for Leo A. Price, receiver of Gidding & Co. Inc.

MESSRS. EDWARD, O'LOUGHLIN & GEORGE (Mr. O'Loughlin, of counsel) for the claimant.

On or about the 23rd day of April, 1920, Jane Schuyler Morse, of New York City, leased to J. M. Gidding & Co. Inc., a New York corporation, having its principal place of business in the Borough of Manhattan in the City of New York, certain premises, in said borough and city, known as No. 3 West 46th Street, for a term of twenty-one years commencing on the first day of June, 1921, and ending on the 31st day of May, 1941, at an annual rental of $16,000. payable in equal quarterly instalments on the first days of June, September, December and March in each year of said term. The lessee covenanted to pay the rent and all taxes, and to perform certain other obligations specified in the lease, and also to deposit $8500. in U. S. bonds as security for the performance of its covenants, and in case of any application of the securety or any part thereof to satisfaction of the lessee's covenants, it agrees to keep the security good. The lease contains, also, an elaborate covenant for continuing the liability of the lessee to pay as damages the equivalent of the difference between the reserved rental and any rentals received on reletting if, before the expiration of the term, the lease should be terminated by reentry of the landlord by summary proceedings, or otherwise, for breach of any of the conditions of the lease by the lessee authorizing such reentry, and that such damages *should be due and payable by the lessee to the lessor on the several rent days specified in the lease.* This provision for continuing liability is made applicable also by appropriate words to a termination of the lease by notice to quit "if the lessee be adjudicated a bankrupt, or make a general assignment, or take the benefit of any insolvent act." A copy of the lease is returned herewith as claimant's exhibit 2.

Gidding & Co. defaulted in the payment of the rent falling due September 1, 1923, and on September 11, 1923, $4050. of the U. S. bonds deposited as security were used to pay this instalment of rent, and the lessee failed, on demand, to keep the security good by restoring this amount.

The lessee also failed to pay the taxes falling due on May 1, 1923 amounting to $1274.10.

On October 2, 1923, a receiver of Gidding & Co. was appointed in this action. Gidding & Co., as appears from its answer, joined in the application for the receiver, and at the time of his appointment was and is insolvent.

By an order duly made and entered in this action on or about January 4, 1924, claimants were required to file their claims with the attorneys for the receiver on or before March 1, 1924.

On December 1, 1923, a quarterly instalment of rent, $4,000. became due and was not paid, and on December 5 the claimant paid the taxes and accrued penalties for 1923, amounting to $2609.85.

On December 19, 1923, the claimant demanded of the receiver payment of the December rent and of the taxes and also, replacement of the impaired security, but the received declined to comply with any of these demands. Thereafter, the claimant, by permission of the court duly obtained, (Ex. 3), gave the receiver and the lessee notice of termination of the lease and also notice to quit in the form and for the times specifically provided in the lease (Exs. 4 and 5). Pursuant to said notice, and according to the provisions of the lease, the lease expired on February 6, 1924. Thereafter the lessor instituted summary proceedings for the eviction of the lessee and the receiver from the demised premises. In these proceedings a final order was duly made and a dispossess warrant thereunder issued on February 19, 1924, which were duly served upon the receiver and the lessee on February 26, 1924.

On or about February 28, 1924, the claimant filed with the receiver her claim, duly verified, for $47,156.85, made up of the following items:

> "14. By reason of all the foregoing said J. M. Gidding & Co. Inc. is indebted to this claimant in the following amounts:

Rent due December 1, 1923	$ 4,000.00
Taxes and penalties paid December 5, 1923	2,609.85
Face value U. S. Goyernment bonds, which should have been replaced Sept. 11, 1923	4,050.00
Damages on termination of lease for breach of covenant as aforesaid.....	36,497.00
	$47,156.85

Together with interest on $4,000. from December 1, 1923—on $2,609.85 from December 5, 1923,—and on $4050. from September 11, 1923."

The receiver admits the items for December rent, $4,000. and taxes and penalties, $2,609.85, both of which accrued prior to the expiration of the time for filing claims. He disputes the claim for diminished security, $4,050., and the claim for damages for the loss of the unexpired term, $36,497.

This item of $36,497. represents the excess of the total rent reserved for the unexpired term over the alleged estimated value thereof, which is stated in the claim (Ex. 1, subd. 13) to be $13,000. per annum. It is expressly claimed, however, as damages substained by the lessor under the lessee's covenant to continue to be liable after the termination of the lease for a sum equivalent to the amount of all the rent reserved in the lease less the avails of reletting, *such damages to be due and payable by the lessee on the several rent days specified in the lease* (claim, ex. 1, subds. 11-13).

The receiver objected to this item on the ground that the lessee's covenant for continuing liability after reentry of the landlord provides specifically not only that the measure of damages should be the equivalent of the difference between the rent reserved and the avails of reletting, but also that such damages, so measured, "*should be due and payable by the lessee to the lessor upon the several rent*

days hereinbefore specified," that is to say, on the first days of June, September, December and March in each year; that this provision was exclusive of any other measure of damages, and that the lessor was not entitled to claim a present lump sum equal to the excess of the total rent reserved for the unexpired term over the present value of such a lease for the years it had still to run determined by expert testimony.

By agreement between the parties the receiver has consented that the claimant should offer to prove her damages for the lessee's alleged breach of the covenant to remain liable after termination of the lease, but objects to the competency of the proposed proof upon the ground above stated, and the master has been requested to determine the validity of the claim for this item of damages in order that the expense of calling expert witnesses on both sides may be avoided if the claim is not provable; and it is understood that if the claim should eventually be sustained the amount of the item demanded is not admitted but must be proved.

It seems to be ADMITTED IN the briefs filed with the master on behalf of the claimant that if her right to damages must be determined by the language of the lessee's covenant for continuing liability, the claim now made by her under that covenant will not be provable; but it is argued that the receivership and the insolvency of the lessee constitute an *anticipatory breach* of this covenant, relieving the lessor from its provisions in respect to payment of damages and entitling her to prove her whole damages as of the present time in a lump sum on the basis of a comparison between the present value of the unexpired term and the rent reserved for the seventeen years that the lease has still to run.

In her first brief filed with the master her claim is stated as follows:

> "The claim is not for rent to accrue in the future, it is not for breach of the covenant to pay rent, nor is it for damages for loss of the landlord's bargain, but it is for damages for the anticipatory breach of

the contractual obligation on the part of Gidding & Co. which came into existence only upon the termination of the lease."

And again in her reply brief the claimant argues:

> "The covenant is peculiar. It is not like any of the covenants discussed in the cases cited by counsel for the receiver. It is not in form a covenant to pay the 'difference' between the rent reserved and the proceeds of reletting, but it is in the following form:
>
> > 'The lessee hereby agrees to pay to the lessor the equivalent of the amount of all the rent reserved herein, less the avails of reletting, if any, and the same shall be due and payable by the lessee to the lessor on the several rent days above specified.'
>
> This is not a covenant to pay such damages as may be suffered from time to time as and when they shall be ascertained, but it is a positive promise to pay the amount of the rent reserved in the lease, subject, however, to a deduction. The result may, as a practical matter, be the same as would flow from the other sort of covenant, but it may be said that here is a recognition of the fact that the rental value of the premises was and would be less than the rent reserved, and that, therefore, the avails of reletting would be less.
>
> Under these circumstances, it cannot be said that the claim was contingent but only that its amount was uncertain."

The effect of this alleged anticipatory breach is the only point to be decided.

The decision of the point submitted is necessarily determined by—

(1) the cancellation of the lease on February 19, 1924, by the issuance of the warrant in summary proceedings, and,

(2) the language of the special covenant or agreement contained in the lease continuing the personal liability of the tenant.

In respect to the provability of claims in equity receiverships, the rule stated by Judge Noyes, writing the opinion of the Circuit Court of Appeals for the Second Circuit in *Pennsylvania Steel Co.* v. *New York City Railway Co.*, 198 Fed. 735, has been generally approved:

> "All claims ought to be in before the accounts are made up for distribution, and there should be no opportunity for uncertainty, delay or expense in reopening or recasting them. A narrower rule can be adopted which would obviate any difficulty in this regard and which would be simple, equitable and workable. It is this: Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends. But there is no equitable reason why claims which are certain when presented and which are presented in time should have been certain at some arbitrary anterior period."

This rule is cited with approval in *Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 601 and with more precise statement in *Samuels* v. *Drew*, 292 Fed. 734, 736 (C. C. A. 2d Circ.)

The lessee's alleged "anticipatory breach" of the covenants of the lease to pay rent and taxes and perform other obligations as tenant, was a consequence of its insolvency and the receivership. The lessee thereby became unable, and the receiver refused, to perform any longer the covenants of the lease imposing obligations upon the lessee as tenant. This breach led to the termination of the lease and the annulment of the relation of landlord and tenant. The termination of the lease and the reentry by the landlord through summary proceedings brought into active operation the agreement continuing the personal liability of the lessee, which, though contained in the lease, was wholly unconnected with the use of the land. This special agreement provides with completeness and precision just what the continuing liability of the former tenant for damages

should be, how the damages should be ascertained and even when they should become due and payable. Without this special agreement, the tenant, after the reentry of the landlord by summary proceedings would have been under no further liability at all arising out of the lease proper. (C. P. A. 1434; *Hall* v. *Gould*, 13 N. Y. 127; *Michaels* v. *Fishel*, 169 N. Y. 381, 387; *Gardiner* v. *Butler*, 245 U. S. 603.)

To say that the anticipatory breach arising from the receivership, as a consequence of which the landlord reentered and annulled the lease, was also a breach of the special agreement of the parties providing what their respective rights and liabilities should be upon such a reentry for such a breach, is an untenable argument. The anticipatory breach in this case affected the special agreement for continuing liability only by giving it vitality and operative effect. In the claimant's brief it is stated that the special agreement for continuing liability of the tenant in this lease is peculiar and unusual, and stress is placed upon the use of the word "equivalent" in the tenant's agreement to pay to the lessor after termination of the lease, "the equivalent of the amount of all the rent reserved herein less the avails of reletting" etc. The form of the covenant in this lease does not appear to be unusual. The covenant quoted in *Seidlitz* v. *Auerbach* (186 App. Div. 7, pp. 8-9; rev. 230 N. Y. 167) is almost literally the same except that it omits the provision for periodic payments. In such covenants the word "equivalent" is used to indicate that the tenant's continuing liability after the termination of the lease is not technically for "*rent*" but for "*damages*", though measured in terms of rent by the excess of the rent reserved over rent received on reletting during the unexpired term. In an early case in New York the continuing liability was stated in the complaint to be for rent, and though the Court of Appeals held that this was immaterial and the word "rent" would be construed to mean "damages", there was a strong dissent (*Hall* v. *Gould*, 13 N. Y. 127). The word "equivalent" is used to avoid this objection.

The construction of the provision of the special agreement—

> "And the same shall be due and payable by the lessee to the lessor on the several rent days above specified"—

is well settled by authority (*McCready* v. *Lindenborn*, 172 N. Y. 400). In that case the covenant for the continuing liability of the tenant provided that the tenant should pay as damages (p. 402)—

> "The difference between the amount of rent hereby reserved and the amount of rents which shall be collected and received * * *. from the demised premises during the residue of the said term * * * *in equal monthly payments as the amount of such difference shall from time to time be ascertained.*"

The court said, construing this covenant (p. 407)—

> "By the express contract of the parties a separate and independent cause of action arose under this covenant every month when there was a deficiency ascertained in the manner provided. The plaintiff was at liberty to allow the causes of action for monthly deficiency to accumulate and to recover upon several at the same time, but she could not recover any deficiency until it had actually accrued and had been ascertained in the mode provided by the covenant."

The court placed this decision on the ground that, after the termination of the lease by the landlord's reentry, the tenant was under no further liability upon the lease, as such for payment of rent or performance of any other obligation as tenant, and that his continuing liability for damages must be determined entirely by the terms of the special agreement for such liability.

The court emphasized also the rule that—

> "When the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages and agree when they are to be paid, the remedy thus provided must be exclusively followed (p. 409)."

The authority of *McCready* v. *Lindenborn* is unimpaired and the agreement in the lease from Mrs. Morse to Gidding & Co. in the present claim that the damages shall be "*due and payable by the lessee to the lessor on the several rent days above specified*"; that is to say the first days of June, September, December and March of each year—is just as precise and specific as the covenant in *McCready* v. *Lindenborn*.

It is argued, on behalf of the claimant, that *McCready* v. *Lindenborn* does not apply and that even if it did its authority has been weakened by the decision of the Appellate Division in *Darmstadt* v. *Knickerbocker Chandelier Co.*, 188 App. Div. 129.

It does not apply, the claimant argues, because in *McCready* v. *Lindenborn* there was no anticipatory breach; but the lease in that case provided that if the premises became vacant the landlord might reenter and relet them as agent of the tenant, and that on default in the performance of any of the covenants of the lease the relation of landlord and tenant, at the option of the landlord, should cease and determine. The exercise of this option was, of course, proved by the landlord's reentry. As already shown, the alleged anticipatory breach resulting from the insolvency of Gidding & Co. and the appointment of a receiver, was not a breach of the covenant for continuing liability but operated, through the consequent annulment of the lease, to make that covenant effective.

There is nothing in the decision of the Appellate Division in *Darmstadt* v. *Knickerbocker Chandelier Co.*, 188 App. Div. 129 that in any way weakens the authority of *McCready* v. *Lindenborn* which the court expressly distinguished on the obvious ground that it contained an express provision for monthly payments of the damages. The covenant in the lease in the *Darmstadt* case contained no provision at all for periodic payment of damages by the former tenant after the termination of the lease by summary proceedings, but provided that in the event of reentry by the landlord by such proceedings, the landlord might

relet as agent of the tenant, applying rents received on the reletting to the payment of expenses and the rent due under the lease, and that the tenant "*should nevertheless remain liable for any deficiency.*" Covenants in this form have been generally held to give no right of action until the expiration of the term on the ground that until then the liability of the tenant cannot be determined. The Appellate Term so decided and dismissed the complaint, but the Appellate Division while approving the decision of the Appellate Term, held that it must reverse because the Court of Appeals in its then recent decision in *Mann* v. *Munch Brewery*, 225 N. Y. 189, had decided, contrary to its former rulings, that on a covenant of continuing liability similar to the one before the court in the *Darmstadt* case, an action could be brought before the expiration of the demised term. This conclusion seems to have been due to a complete misapprehension by the Appellate Division of the provisions of the lease before the Court of Appeals in *Mann* v. *Munch Brewery*, in which the question before that court was whether the defendant, who was in possession as assignee of the original tenant and had been evicted in summary proceedings, had assumed the covenants of the lease. The lease provided (225 N. Y., p. 194) that the tenant should not be relieved from payment of rent by eviction in summary proceedings or by assignment of the lease and that every assignee should continue to remain liable for the payment of the rent and performance of all the covenants and conditions of the lease. It appears clearly enough, by implication, from the portion of the lease quoted in the opinion of the Court of Appeals that the lease provided for monthly payments of rent by the tenant, and it is stated in the opinion (p. 195) that the defendant assignee had itself, after entering into possession, promised to pay the rent monthly. An inspection of the record shows that the tenant covenanted to pay the rent—

> "In equal monthly payments * * * in advance on the first day of each and every month during the term aforesaid."

The action was brought to recover only for the months that had expired at the time of the commencement of the action. The Court of Appeals, having decided that the assignee had assumed the covenant to pay rent monthly after eviction, simply enforced the covenant according to its terms. The case was in this respect, therefore, on all fours with *McCready* v. *Lindenborn* which, indeed, is cited as authority by the Court of Appeals on the validity of the covenant for continuing liability (225 N. Y. 194). When the misapprehension under which the Appellate Division labored in the *Darmstadt* case in respect to the form of the covenant for continuing liability in *Mann* v. *Munch Brewery* has been judicially corrected, not improbably the decision of the Appellate Term (104 Misc. 547) will be held to have been correct. However this may be, the case is not in point in the present controversy. The covenant in this case provides for a periodic ascertainment of the damages and is directly within *McCready* v. *Lindenborn*, the authority of which is not questioned in the *Darmstadt* case.

Other authorities cited in the briefs, while deciding questions analogous to that presented by this claim, are clearly distinguishable. Those that involve the construction of a lessee's covenants for continuing liability after reentry of the landlord and termination of the lease necessarily turn upon the form of the covenant, and it will be found that apparent differences in the decisions are satisfactorily explained and reconciled by comparison of the covenants involved. In *Filene's Sons Co.* v. *Weed*, 245 U. S. 598 and in the first claim allowed in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, the lessee agreed, in the event of reentry and the termination of the lease, to pay the difference between the rental value and the rent and other payments named in the lease for the residue of the term. These covenants were, as the court held, agreements between the parties that the evicted lessee should be liable for a *present* payment computed according to the familiar rule of damages accruing to a lessor for loss of the profits of the unexpired term. In such cases, the contract provides for *a*

present claim determined precisely in accordance with an agreed rule. On the other hand, where the case presents a covenant which provides that the tenant shall remain liable during the unexpired term for the amount, or the "equivalent" of the amount, of all the rent reserved less the avails of reletting, without any provision for periodic settlements, the decisions hold with substantial uniformity, that the lessor has no right of action until the completion of the unexpired term, because until that time comes it is impossible to determine what the damages will be, or whether there will be any damages at all. (*Seidlitz* v. *Auerbach*, 186 App. Div. 7, 13, rev. 230 N. Y. 167; *Matter of Hevenor*, 144 N. Y. 271; *Harding* v. *Austin*, 93 App. Div. 564). Substantially similar are the bankruptcy decisions upon covenants which take the form of an agreement by the tenant to indemnify the lessor during the residue of the term for loss of rent and other payments incurred by the termination of the lease. (*In Re Ells*, 98 Fed. 967; *In re Shaffer*, 124 Fed. 111). The only conflicting decision on this form of covenant to which my attention has been called, or which I have been able to find, is the decision of the Appellate Division in *Darmstadt* v. *Knickerbocker Chandelier Co.*, 188 App. Div. 129, hereinbefore explained.

In the third form of covenant, like that in this case, where the tenant's agreement is to continue liable, after eviction, for damages to be determined and paid from time to time at the end of specific periods during the residue of the term, the necessary construction, both upon principle and authority, is that the lessor is restricted to a recovery in any action he may bring to the damages that have already become due according to the terms of the contract.

The receiver argues that there can not be an "anticipatory breach" of a unilateral agreement to pay money, like the covenant of the lessee to pay damages after the termination of the lease by reentry of the landlord for breach of condition. It is not necessary to decide this point because the determination of the controversy turns entirely upon the construction to be placed upon the agreement actually

expressed in the lease in which the parties have stated what their respective rights and liabilities shall be upon any breach of the lease by the lessee leading to its termination and the reentry of the landlord. In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, the court held that an adjudication of bankruptcy against one of the parties to an executory contract to render services to the other, either before or during performance, which disables the bankrupt from further performance, constitutes an anticipatory breach and gives the injured party an immediate right of action within the doctrine of *Roehm* v. *Horst,* 178 U. S. 1. Landlord and tenant cases cited in opposition to the claim, including *In Re Roth and Appel,* 181 Fed. 667, were distinguished by the court (p. 590) because of the "diversity between duties which touch the realty, and the mere personalty," citing Co. Litt., 292, b. sec. 513. In *In re Mullings,* 238 Fed. 58, the doctrine of anticipatory breach was applied to a lease made by a corporate tenant which had instituted a voluntary proceeding for dissolution before the commencement of the term, and afterwards was adjudicated a bankrupt on its voluntary petition. In that case there had been no termination of the lease by reentry annulling the relation of landlord and tenant, nor did the case involve any covenant or special agreement for continuing liability of the tenant after such termination.

This item of damages, therefore, in the claim presented to the receiver should be disallowed, not because it is contingent and uncertain, but because it is contrary to the contract between the parties, which expressly provides for damages measured by the difference between the rent reserved and the rent *actually* received from time to time on reletting, to be ascertained and paid quarterly. Obviously, before it can be paid, it must be ascertained. Undoubtedly, any claim in conformity with the contract covering any period except the quarter falling due on March 1, 1924, would have been uncertain and, indeed, impossible of estimation, and, therefore, wholly contingent, because the rents that would be received in future period could not be known

and the avails of reletting might in many quarters exceed the rent reserved.

I return herewith:

(1) Stenographer's minutes of proceedings before the special master.

(2) Exhibits:—

(1) Original claim.
(2) Copy of lease from Morse to Gidding & Co.
(3) Copy of petition and order of January 14, 1924.
(4) Twenty days notice to lessee of lessor's intention to end the term, etc.
(5) Lessor's demand upon receiver for payment of rent, taxes, etc.

All of which is respectfully submitted.

Dated June 27, 1924.

(Signed) WALLACE MACFARLANE,
Special Master.